

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1355

IN THE MATTER OF:

Application of D. C. Transit)	Served October 10, 1974
System, Inc., for Authority to)	Application No. 453
Increase Fares)	Docket No. 156
)	
Application of D. C. Transit)	Application No. 436
System, Inc., for Authority to)	Docket No. 156
Increase Its Fleet in Lieu of)	
Purchasing Buses)	
)	
Application of D. C. Transit)	Application No. 613
System, Inc., for Authority to)	Docket No. 216
Increase Fares)	

The United States Court of Appeals for the District of Columbia Circuit (Court) in separate decisions dated June 28, 1973, held that Order Nos. 773, served January 26, 1968, and 1052, served June 26, 1970, in response to applications by D. C. Transit System, Inc. (Transit) for authority to increase fares were invalid. Democratic Cent. Com. of D. C. v. Washington M. A. T. Com'n., 485 F.2d 786 (1973) and 485 F.2d 886 (1973). The Court stated that the Commission erred when it refused to consider, as part of the decision to authorize the increase in fares, the excess of market value over book value of certain properties transferred by Transit from operating to nonoperating status.

We held a Prehearing Conference on May 2, 1974, and directed the submission of statements of the issues and motion on procedures, and responses thereto. Several parties filed statements, motions, and responses. The purpose of this order is to review these filings with respect to the erroneous conclusions of the Commission.

Property Identification

The Staff of the Commission (Staff) filed a statement in which is listed several properties identified by the Court. The staff submits that in order to verify the list and identify all the properties transferred from operating to nonoperating status, the records of Transit should be reviewed.

With respect to the identification of properties, Transit disputes that each of the 12 properties identified in the Staff's statement were transferred to nonoperating status on dates relevant to this proceeding. Transit opposes the inclusion of the properties known as Southern (Seventh Street) Carhouse and Fourth Street Shops. Transit submits that the sale of these properties and the profits derived therefrom were passed upon by the Public Utilities Commission for the District of Columbia in Order No. 4577, and by the Court of Appeals for the District of Columbia Circuit in D. C. Transit System, Inc. v. WMATC, 350 F.2d 753 (1965). Transit argues that issues related to the disposition of these properties have been fully litigated and that the resolution of those issues is binding on all parties herein under the doctrines of res judicata and collateral estoppel. Transit also opposes the inclusion of the properties known as the Eastern Garage and Brookland Garage. Transit submits that the Court stated that those properties were not at any time relevant to the present proceeding.

Transit contends that only those properties which were transferred to nonoperating status during the 3 years prior to the effective date of Order Nos. 773 and 1052 should be considered for the purposes of determining the amount of restitution. The reason advanced for the 3-year prior limitation is that the Statute of Limitation as to claims such as those of protestants is 3 years under the applicable section of the District of Columbia Code. With respect to Order No. 1052, Transit submits that nothing except the appreciation in market value of land transferred to nonoperating status is involved.

The Staff does not agree that only those properties transferred during the Statute of Limitation period preceding the effective date of Order Nos. 773 or 1052 should be considered. The Staff likewise does not agree that the Statute of Limitation, set forth in §12-301 of the District of Columbia Code, applies to this proceeding. Finally, the Staff does not accept Transit's proposition that only the appreciation in market value of land is involved in the remand of Order No. 1052.

The District of Columbia (District) submits that the scope of the Commission's inquiries is not restricted by the provisions of the Statute of Limitation, and that it is questionable whether the Statute of Limitation is applicable. District contends that, even if it were to apply, it would not start running until those who have suffered fare overcharges become aware of the fact.

Book Value

The Staff is of the opinion that the original cost of the transferred properties could be either book value or market value at the time of acquisition. The Staff believes that the book value could be determined

from the records of Transit. The Staff requests that the Commission direct that an estimate of the market value of the transferred property on the date of acquisition be prepared by a qualified real estate appraiser.

Transit agrees with the Staff's suggestion that the market value at the time of the acquisition of the properties could be utilized as a basis for measuring the appreciation in market value. Transit submits that the utilization of book value at the time of acquisition would not fairly reflect the extent of the appreciation in value of the properties while devoted to public service. Transit's theory is that the book value assigned to the properties represented an arbitrary amount unrelated to the actual value of the properties. Transit argues that an accurate measure of the appreciation in the market value of the properties could be made only by comparing the market values on the date of acquisition and on the date when the Commission ordered or directed the removal of the properties from operating service.

Date of Transfer

The Staff submits that the date of transfer from operating to nonoperating status can be determined from the records of Transit. The Staff contends that the determination of whether Transit's use of the property changed on the recorded transfer dates would not be indicated by Transit's records. The Staff argues that Transit's use of certain properties which were not transferred to nonoperating status on its books should be considered to have been the equivalent of transferring the property from operating to nonoperating status. The Staff requests that statements and other evidence, if any, be solicited concerning Transit's use of these particular properties.

Transit rejects the Staff's opinion that an examination should be made of the use of Transit's properties to determine if the date of transfer from operating to nonoperating status coincides with the actual change in the use of such properties. Transit contends that the only date to be determined is the date when an accounting entry pursuant to the Commission's Regulation 61 would have been made if Regulation 61 had been in effect. Transit argues that this date would be the date on which the Commission approved the removal from service, conversion to other use, or abandonment of the real property involved. Transit states that this date is the key date referred to by the Court in its opinions. Transit further states that the Commission should examine its own records and orders to determine the dates when it granted approval or directed the removal from service of each of the relevant properties.

Market Value

The Staff requests that an appraisal of the market value of the properties transferred be made. According to the Staff, the appraisal should be performed by a professional appraiser of recognized standing showing,

as of the date of transfer, (a) the value of the land if continued in carrier service and (b) the relative value if devoted to the highest and most profitable use for which such property is adaptable and needed. The Staff is convinced that the existence of any buildings or other structures and the cost of their removal if such removal is required, should be considered in making a determination of the highest and most profitable use. The Staff believes that similar appraisals should be performed for any properties which were not formally transferred on the records of Transit, but which, by actual usage, were changed to a nonoperating status.

On the assumption that market value on the date of transfer is to be compared with the market value on date of acquisition, Transit submits that all evidence as to market value of properties should be limited to the market value of properties computed on the theory of assessed values. That theory was utilized by the parties in the prior proceedings in these cases. Therefore, Transit contends that the parties should be required to use the same theory in the current proceedings.

Transit urges that the assessed value method of market valuation be used as to both the acquisition date and the date of transfer. Transit contends that, if the assessed value theory is not used, the only other available method of appraisal for the dates of acquisition and the date of removal from service would be to apply the theory of highest and best use. Transit states that real estate uniquely built and located for transit use is traditionally valued by determining the comparable sales value of the land and adding the reproduction cost new, less depreciation, of any buildings or other structures. Transit argues that, as of the date of the Commission's approval of the removal from service, the properties would no longer be useful for transit purposes. Thereafter, such properties should be valued on the basis of market value for the highest and best use of such property. Transit requests that the valuation be measured by comparable sales value of the land without the value of the buildings or other structures thereon, unless such buildings or structures were necessary to determine the highest and best use of the property. Transit concedes that the cost of removing the buildings or structures, if such was required, should be deducted in fixing the highest and best use value of the property.

Expenses of Sale

The Staff states that the taxes and other expenses incidental to an arm's length sale of the properties should be allowed as part of the appraised valuation of the transferred properties. An estimate of the amount of taxes and other expenses is dependent upon the appraised value. The Staff requests that estimated amounts for each valuation theory be determined. The Staff argues that the proper procedure would be to determine the taxes as though the sale were effected on the date of transfer. This

determination would involve a consideration of Transit's financial condition at the date of the estimates. Transit agrees with the Staff that deductions must be made for allocable taxes and that applicable costs and expenses should be computed.

The Black United Front (BUF) contends that the net income treatment of appreciation on properties transferred is inapplicable to the Market Street 1/ situation found by the Court. BUF argues that, where the system was not profitable in any case, the fiction of deducting taxes as if taxable sales had taken place is inapplicable and unreasonable. BUF asserts that the entire difference between book value and market value of the appreciated properties should be credited to the farepayers.

Transit disagrees with BUF's proposition that Transit's financial condition precludes consideration of taxes. Transit contends that the Court did not find that Transit was a failing enterprise but, rather, the Court directed that such issue should be examined in the remand proceeding to determine if Transit was entitled to any fare increase when Order No. 1052 was issued. Transit argues that the Market Street doctrine does not relate to what taxes it would or would not be obliged to pay. Furthermore, Transit asserts that once the appreciation in market value of the transferred properties is constructively added to Transit's return, such appreciation removes Transit from challenge as a failing enterprise.

Finally, Transit argues that the Court's repeated reference to allowing a deduction for the taxes and other expenses is sufficient reason for rejecting the BUF's position on taxes and costs.

Calculation of Appreciation

The Staff states that the amount of appreciation in value for each property transferred from operating to nonoperating status must be calculated. The Staff asserts that the Commission's calculation necessarily would involve a determination of original cost, date of transfer, market value, and the taxes and other expenses incidental to an arm's length sale of the properties.

In reply, Transit contends that the determination of the appreciation in market value would involve the following calculations: The market value on the date the properties were first devoted to operating status by the investors of Transit should be subtracted from the market value of such

1/ Market Street refers to the United States Supreme Court decision, Market Street Railway Company v. Railroad Commission, 324 U.S. 548 (1945).

properties on the date transferred to nonoperating status by the investors; and that from such difference the theoretical costs and expenses of taxes and all other costs and expenses which would have been incurred if the properties had been sold instead of transferred to nonoperating status should be deducted; and, in turn, from that amount should be subtracted the amount of appreciation applied as compensation to Transit's investors for the depreciation reserve deficiency. Thus, to determine the appreciation in market value, Transit submits that it is necessary to determine the following: The market value of the properties as of the date transferred to nonoperating status; the market value of the properties as of the date first devoted to operating status by the investors of Transit; the deductions from each of the market values for the value of all improvements made on the properties; the deductions for allocable taxes, and other costs and expenses computed as if such properties had been sold on the date transferred to nonoperating status; and, the deductions to be made from the market values for the amounts of appreciation previously applied as compensation to Transit's investors for the depreciation reserve deficiency.

The Staff argues that the Court did not intend that the appreciation in value should be reduced by the depreciation deficiency. Rather, the Staff contends, the appreciation in value of the assets involved in the depreciation deficiency study represented the value to be given the investors for the depreciation deficiency. The Staff believes that this amount was given to the investors when the properties were transferred from operating to nonoperating status. The Staff submits that if the amount of appreciation in value exceeds the depreciation deficiency, then the amount of the depreciation deficiency should be credited to the previously established Riders' Fund.

Other Matters

BUF requests that the Staff be directed to prepare a list of all properties involved in the remand proceedings and to serve a copy on all counsel. BUF further requests that the Commission compel production of all records relating thereto held by both Transit and the Washington Metropolitan Area Transit Authority (WMATA). BUF also requests that such records be filed in a place conveniently available to the parties.

BUF states that it should be up to the individual parties to supplement the work of the Staff and the books and records of Transit. BUF agrees that original cost should be based on either book value or market value at the time of acquisition and requests that this method should be adopted. According to BUF, the District has among its records the market value used by it at the time it prepared real estate assessments for each of Transit's properties. BUF believes the District should furnish this information and that it should be used as the market value. If acceptable, this procedure would replace the difficult and costly method involved in retaining an

independent appraiser to value the property for earlier years. Further, BUF asserts that use of the District's valuation would eliminate the need for competing appraisals. BUF states that it is willing to stipulate to the market value ascertained from the District's records.

Transit made a general request that the Commission direct WMATA and District to produce and make available, with respect to any of the properties determined to be involved in any of the hearings in which said party is involved directly or indirectly herein, a copy of all statements, memoranda, letters, studies, analyses, appraisals, reports, and work papers. Transit also desires to review the supporting materials and drafts made by or for WMATA or District, or submitted to them by others (a) as to whether any such property could or would be used or useful in the proposed operation of the transit system by WMATA or any other operator, (b) as to the original cost, reproduction cost, or any other cost and the value of such properties, and (c) with reference to WMATA, the anticipated results of future operations of the bus transportation system for the area formerly served by Transit and its subsidiaries.

WMATA submits that Transit's statement, if intended to be, is not sufficient to constitute a formal request for evidence and should not be acted upon by the Commission.

DISCUSSION AND CONCLUSIONS

We believe that the following should be considered at the hearing herein ordered:

1. The identification of all properties which Transit transferred from operating to nonoperating status prior to the issuance of Order No. 1052.
2. The market value of the properties at the time of their transfer to nonoperating status.
3. The amount paid by the investors for the properties when acquired by Transit.
4. The amount of depreciation expense paid by the farepayers and amortization during the period the properties were used as operating properties by Transit.
5. The cost of all improvements to the properties made by the investors during the period the properties were used by Transit as operating properties.
6. The taxes and sale expenses that would have been paid by the investors at the time of transfer to nonoperating status if the properties actually had been sold pursuant to arms length negotiations.

We are of the opinion that the Statute of Limitation set forth in the District of Columbia Code (§12-301) is inapplicable to this remand proceeding. The amount of restitution to which the farepayers should properly be entitled arises as the result of the Commission's errors in developing the initial record on the applications of Transit for authority to increase fares. The remand proceeding is merely a continuation of the prior Commission determinations. In this respect the action to be taken by us does not involve a Civil Action. Rather, the findings to be made relate directly to the earlier rate-making activities of the Commission. These actions are not embraced within the intent of the Statute of Limitation. The actions of this Commission are not governed by that portion of the Code of the District of Columbia.

The requests for submissions by BUF and Transit of either the District or WMATA for records, documents or other papers will not be discussed herein. The directives set forth in Order No. 1355, served simultaneously herewith, shall control the procedural aspects herein.

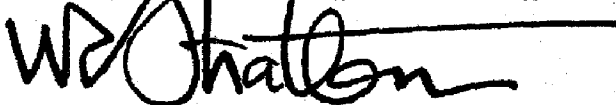
We shall direct that prepared direct and rebuttal testimony be filed and served by the Staff, BUF, Democratic Central Committee of the District of Columbia, Transit, and the Washington Construction Area Industry Task Force. See Rule of Practice and Procedure 23 and Regulation 56-01(d).

THEREFORE, IT IS ORDERED:

1. That a public hearing be, and it is hereby, scheduled for Tuesday, March 4, 1975, at 10:00 A. M., in the Hearing Room of the Commission, Room 314, 1625 Eye Street, N. W., Washington, D. C. 20006.

2. That the Commission Staff, Black United Front, Democratic Central Committee of the District of Columbia, D. C. Transit System, Inc., and the Washington Construction Area Industry Task Force, shall file with the Commission and serve upon the parties, prepared direct testimony on or before Tuesday, February 11, 1975, and prepared rebuttal testimony on or before Tuesday, February 25, 1975.

BY DIRECTION OF THE COMMISSION:

A handwritten signature in black ink, appearing to read "W. R. Stratton", with a long horizontal line extending to the right.

WILLIAM R. STRATTON
Vice Chairman